



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 29, 2022

IN THE MATTER OF:

Appeal Board No. 622690

PRESENT: MARILYN P. O'MARA, JUNE F. O'NEILL MEMBERS

In Appeal Board No. 622690, the employer appeals from the decision of the Administrative Law Judge filed March 31, 2022, which granted the claimant's application to reopen 021-46735 and overruled the initial determination holding the claimant ineligible to receive benefits, effective August 3, 2020 through October 4, 2020, on the basis that the claimant was not capable of work.

In Appeal Board No. 622691, the employer appeals from the decision of the Administrative Law Judge filed March 31, 2022, which granted the claimant's application to reopen 021-46742 and overruled the initial determination disqualifying the claimant from receiving benefits, effective September 14, 2020, on the basis that the claimant voluntarily separated from employment without good cause.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

We have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made insofar as they concern the issues of the claimant's application to reopen A.L.J. Case Nos. 021-46735 and 021-46742 and voluntary separation of employment without good cause. The findings of fact and the opinion of the Administrative Law Judge, insofar as they concern these issues only, are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of

the Board.

As to the issue of capability of employment, only, based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for a municipal Parks Department from March 2020 until August 4, 2020. His position required him to be on his feet all day carrying around heavy items. On August 4, 2020, the claimant was injured at a nail salon; he suffered second degree burns to both feet from a chemical used at the salon. He was treated at a hospital emergency room for his injuries; the hospital doctor excused him from work until August 12, 2020. On August 12, 2020, at the claimant's follow up visit, the doctor advised that the claimant would be out of work until September 11, 2020 and could return to work on September 14, 2020.

However, on September 14, 2020, the claimant's feet were still painful and swollen such that he could not get his feet into footwear. Although his doctor had determined in August that he would be able to return to work in September, he was still unable to do his own food shopping or other errands and his girlfriend assisted with these tasks. Since he was unable to perform the duties required of his position, he did not return to work on September 14. It was not until November 2020 that the claimant was again able to stand on his feet for any length of time. The claimant had never held any employment which entailed office work, or which could be done remotely; any previous employment he had engaged in involved being on his feet. The claimant filed a claim for benefits on August 18, 2020, made effective August 3, 2020.

**OPINION:** The credible evidence establishes that the claimant was not capable of work from August 4, 2020 through October 4, 2020. We accept the claimant's credible and uncontroverted testimony and documentary evidence which, taken together, establishes that he was not able to engage in any work which involved standing until November due to the injuries he sustained on August 4, 2020. The Appellate Division has held that, "[a] claimant will not be deemed eligible to receive unemployment insurance benefits if he or she is not ready, willing and able to work in his or her usual employment or in any other for which he or she is reasonably fitted by training and experience" (see, *Matter of Ormanian*, 167 AD 3d 1183 (3d Dept 2018)).

With respect to his usual employment, the claimant's medical documentation

establishes that the claimant was not medically cleared to return to work until September 14. The claimant's testimony then establishes that as of September 14, and despite the doctor's August recommendation, he was still unable to stand on his feet or wear shoes and was, therefore, unable to perform the duties his job required. His testimony further establishes that he did not fully recover his ability to stand for any length of time until sometime in November. As such, the claimant was not able to work in his usual employment.

As for the claimant's ability to engage in other work, we do not agree with the Administrative Law Judge's conclusion that the claimant was capable of work since he was able to work remotely should such work be offered to him. In so finding, we note that the record is devoid of any evidence that the claimant sought such work. Moreover, the claimant's testimony establishes that he had never engaged in any remote or office work; or in any work that did not involve being on his feet. We, therefore, cannot find that the claimant was trained and experienced in remote work.

As the claimant could neither perform his usual employment nor any work for which he was reasonably fitted by training and experience, we conclude that he was not capable of work until November 2020 due to his injuries. However, as the claimant's credible testimony establishes that his injury occurred on August 4, the beginning date of the effective period should be modified from August 3 to August 4, 2020.

**DECISION:** The decisions of the Administrative Law Judge are affirmed, in part, and reversed, in part.

The claimant's application to reopen A.L.J. Case Nos. 021-46735 and 021-46742, is granted.

In Appeal Board No.622690, the initial determination, holding the claimant ineligible to receive benefits, effective August 3, 2020 through October 4, 2020, on the basis that the claimant was not capable of work, is modified to be effective August 4, 2020 through October 4, 2020, and, as so modified, is sustained.

In Appeal Board No. 622691, the initial determination, disqualifying the claimant from receiving benefits, effective September 14, 2020, on the basis that the claimant voluntarily separated from employment without good cause, is

overruled.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER

JUNE F. O'NEILL, MEMBER